IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

PATRICK D FAIRCHILD
Claimant

FBG SERVICE CORPORATION
Employer

APPEAL NO. 10A-UI-06006-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/21/10
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Patrick Fairchild filed a timely appeal from the April 16, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 22, 2010. Mr. Fairchild participated. David Williams of Talx represented the employer and presented testimony through Louis Valenciano, Area Manager, and Mike Livermore, District Manager. Exhibits One through Four and A were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Patrick Fairchild was employed by FBG Service Corporation as a part-time cleaning specialist/janitor from May 2009 until February 2, 2010, when Mike Livermore District Manager, discharged him for attendance. Louis Valenciano, Area Manager, met with Mr. Fairchild in Boone on February 3, 2010 to communicate the discharge.

During the employment, Mr. Fairchild resided two miles north of Pilot Mound in northern Boone County. Mr. Fairchild resided on a gravel road, about 1.5 miles from the nearest hard-surfaced road. At the end of the employment, Mr. Fairchild was assigned performing cleaning services at CDS in Boone. The distance between Pilot Mound and Boone is approximately 18 miles. Mr. Fairchild usually started work sometime between 5:00 and 7:00 p.m. The employer was not overly concerned about the start time so long as Mr. Fairchild completed his cleaning duties.

The final absence that triggered the discharge occurred on February 1, 2010. On that day at about the time he was supposed to start work, Mr. Fairchild telephoned Louis Valenciano, Area Manager, and told him that the roads were slushy, but that he intended to report to CDS in Boone. Mr. Fairchild and Mr. Valenciano agreed that Mr. Fairchild could work a shortened shift and only perform essential cleaning duties at CDS before he traveled back home. Mr. Fairchild agreed that the roads were drivable. After agreeing to report for work, Mr. Fairchild did not in

fact report for work or notify Mr. Valenciano that he was not going to report for work. Mr. Valenciano found out the next morning that Mr. Fairchild had not gone to work when a CDS representative contacted Mr. Valenciano to complain about the CDS facility not being cleaned the previous evening. That same morning, Mr. Fairchild notified Mr. Valenciano that he had not made it into work the night before. At the time Mr. Fairchild called Mr. Valenciano on February 2, Mr. Fairchild had been drinking alcohol and told Mr. Valenciano he had been drinking alcohol. Later the same day, Mr. Fairchild telephoned Mike Livermore, District Manager, to discuss the absence. During both phone calls, Mr. Fairchild admitted he was intoxicated. Mr. Fairchild was scheduled to work on February 2, was in no shape to work due to his intoxication, and the employer did not have him report for work.

The employer's written attendance policy required that Mr. Fairchild notify the employer at least four hours prior to the scheduled start of his shift if he needed to be absent. Mr. Fairchild received a copy of the policy and was aware of the policy.

In making the decision to discharge Mr. Fairchild from the employment, Mr. McKern considered two prior no-call, no-show absences that had occurred on August 17, 2009 and January 18, 2010. Mr. Fairchild had provided no reason for the August 17 absence, but told the employer he had missed work on January 18 due to alcohol consumption. Mr. Fairchild acknowledged to the employer that he had a substantial problem with alcohol. After the January 18 absence, Mr. Valenciano told Mr. Fairchild that he would be suspended or discharged from the employment if he had another no-call, no-show absence. Mr. Valenciano had issued written reprimands in the connection with the August and January absences.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency,

> unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The weight of the evidence in the record establishes an unexcused absence on February 1, 2010. Though weather conditions may have been a concern, the weight of the evidence does not establish that the weather conditions kept Mr. Fairchild from reporting for work. Regardless of the weather conditions on February 1, the weight of the evidence indicates that Mr. Fairchild never notified the employer that he would be absent from his shift on February 1, 2010. The administrative law judge found Mr. Fairchild's testimony about his telephone's idiosyncrasies not credible. The greater weight of the evidence indicates that Mr. Fairchild decided not to go into work and failed to notify the employer of that fact. The greater weight of the evidence also indicates that alcohol was a factor in Mr. Fairchild's failure to report for work or notify the employer he would not be reporting for work. The final absence was essentially a third no-call, no-show absence. The final absence followed a no-call, no-absence that was alcohol related and that had just occurred on January 18. The administrative law judge concludes that Mr. Fairchild's unexcused absences were excessive and constituted misconduct in connection

with the employment. Accordingly, Mr. Fairchild is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Fairchild.

DECISION:

The Agency representative's April 16, 2010, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs